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No. 1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF WILLIAMSPORT, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Pennsylvania

JURISDICTIONAL STATEMENT

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Appellants

Of Counsel:
JOHN P. CAMPANA, *Solicitor*
Williamsport, Pa.
ANTHONY MANGUSO, *Corporation Counsel*
ABRAHAM I. OKUN, *Asst. Corp. Counsel*
Buffalo, N. Y.
SAMUEL C. RANCK, *Solicitor*
Milton, Pa.
ROBERT D. O'CONNOR, *Solicitor*
Borough of Renovo
Lock Haven, Pa.
THOMAS P. SHEARER
Pittsburgh, Pa.
ROBERT P. CASEY
FRANK J. McDONNELL
HARVEY GELB
Scranton, Pa.

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JURISDICTIONAL STATEMENT

City of Williamsport, Borough of Renovo, Borough of Milton, and City of Lock Haven, Pennsylvania, City of Buffalo, New York, and Co-operative Legislative Committee, Railroad Brotherhoods in Pennsylvania appeal from the order of the United States District Court for the Middle District of Pennsylvania, entered March 4, 1968, dismissing appellants' complaint seeking to set aside and to permanently enjoin findings, decisions and orders of the Interstate Commerce Commission (Commission), dated May 3 and July 6, 1967, concerning the "partial" discontinuance of Pennsylvania New York

Central Transportation Company (Penn Central)[1] passenger trains No. 570 (southbound) and No. 571 (northbound) between Buffalo, N.Y. and Baltimore, Md. (395 miles).

The Commission's findings and order of May 3, 1967, affirmed by the court below, were that the operation of the trains between Buffalo, N.Y. and Harrisburg, Pa. (312 miles) would (a) unduly burden interstate commerce and (b) is not required by public convenience and necessity; however, operation between Harrisburg, Pa. and Baltimore, Md. (83 miles) would (a) not unduly burden interstate commerce and (b) is required by public convenience and necessity; the southern segment of the train was ordered continued for the one year statutory period, and the investigation discontinued.

The Commission's order of July 6, 1967, affirmed by the court below, denied five petitions for reconsideration of the May 3 findings and order, revised a subsidiary finding concerning financial operations between Buffalo, N.Y. and Harrisburg, Pa., and provided that its order of May 3 would become effective August 3, 1967.

OPINIONS BELOW

The three-judge United States District Court for the Middle District of Pennsylvania issued two opinions. The first was entered July 20, 1967, and is reported at *City of Williamsport* v. *United States*, 273 F. Supp. 899. That opinion deals with the question whether Congress conferred the power of judicial review over findings, decisions and orders entered by the Interstate Commerce Commission after investigation, suspension,

[1] Appellee Penn Central is the successor to The Pennsylvania Railroad Company, effective February 1, 1968.

hearing and decision, concerning the discontinuance of interstate passenger trains, in whole or in part, pursuant to section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)), and whether injunctive relief would lie pending issuance of an administratively final order by the agency.

The second opinion, on the merits of the case, was made March 4, 1968, and is not yet reported. The opinion and order are set forth herein as Appendix B.

The reports and orders of the Interstate Commerce Commission, dated May 3 and July 6, 1967, were entered in its Finance Docket No. 24398, *Pennsylvania Railroad Company Discontinuance of Trains Nos. 570 and 571 Between Buffalo, N.Y. and Baltimore, Md.* Both were made by Division 3 of the Commission, and are not yet reported. These reports and orders, together with the dissent of Commissioner Virginia Mae Brown, are set forth herein as Appendix C and Appendix D.

JURISDICTION

This suit was brought in the three-judge district court pursuant to 28 U.S.C. §§ 1336(a), 1398(a), 2284, 2321-25; 5 U.S.C. § 702; and 49 U.S.C. § 17(9), to annul and set aside findings, decisions and orders of the Interstate Commerce Commission entered under 49 U.S.C. § 13a(1), dated May 3 and July 6, 1967, and to obtain injunctive relief. The complaint was filed May 15, 1967, and amended subsequent to the July 6, 1967 order on reconsideration of the Commission, Division 3.

The order and judgment of the district court dismissing the complaint was entered March 4, 1968.

Notice of appeal was filed in the district court for the Middle District of Pennsylvania on May 2, 1968.

Jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). Jurisdiction specifically for interstate trains under 49 U.S.C. § 13a(1) is sustained by *State of Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80, 83-84 (D.C. Vt. 1967), *City of Williamsport* v. *United States*, 273 F. Supp. 899, 901-3 (M.D. Pa. 1967), and *Public Service Board of State of Vermont* v. *United States*, 87 S. Ct. 3 (Harlan, J. 1966).[2]

STATUTE INVOLVED

The statute involved in this case is Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1), enacted August 12, 1958, 72 Stat. 571, and is set forth in Appendix A herein.

QUESTIONS PRESENTED

Where a railroad, pursuant to 49 U.S.C. § 13a(1), elects to oust the jurisdiction of two or more states over an interstate passenger train, by the act of posting and serving notices of a proposed interstate passenger train discontinuance,

1. Must the Interstate Commerce Commission, after investigation, suspension, hearing and decision, enter statutory findings concerning the proposed discontinuance (whether in whole or in part) set forth in the carrier's notice invoking federal jurisdiction?

2. Is the Interstate Commerce Commission, after investigation, suspension, hearing and decision, empowered to order the continued operation of the passenger

[2] Contra: *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D.C. Minn. 1965) and *State of New Hampshire* v. *Boston & Maine Corp.*, 251 F. Supp. 421 (D.C. N.H. 1965).

train, in part, where the jurisdictional notice proposes discontinuance of the entire passenger train,

(a) absent findings on the entire operation of the train?

(b) with findings on the entire operation of the train?

3. Is the Commission, after investigation, suspension, hearing and decision, in all instances required to enter findings on the entire operation of the train, irrespective of the content of the jurisdictional notice?

4. If the Commission renders findings only on segments of an interstate passenger train, is it nevertheless obligated to consider the impact of the discontinuance of one segment upon the viability of continued operation over the remaining segments?

5. Does the Commission, upon completion of scheduled field hearings at which public witnesses testified concerning the proposed discontinuance of an entire train, and thereafter holds further hearings concerning the partial discontinuance of the same train without affording the public a realistic opportunity to testify concerning such partial discontinuance, accord the parties the fair hearing required of administrative proceedings, with due regard for the four month statutory period required by 49 U.S.C. § 13a(1)?

STATEMENT

This is an appeal taken by five communities and a labor organization from the final order of the district court for the Middle District of Pennsylvania, dismissing their complaint, and which affirmed the decision of the Commission to permit Penn Central to effectuate a partial discontinuance of its final two day-

light trains, one operating daily in each direction between Buffalo, N.Y. and Baltimore, Md.

The Commission segmented the train, and permitted discontinuance of the 312-mile run between Buffalo, N.Y. and Harrisburg, Pa., while requiring the continued operation of the 83-mile run between Harrisburg, Pa. and Baltimore, Md.

1. The Commission's Decision of May 3, 1967

By the act of filing and posting notices on December 7, 1966, Penn Central invoked the statutory provisions of section 13a(1) of the Interstate Commerce Act that it would discontinue its Buffalo-Baltimore daylight passenger trains for their entire operation between Buffalo and Baltimore. The notice and filing ousted state jurisdiction over these trains by the terms of the statute, and conferred exclusive jurisdiction upon the Interstate Commerce Commission.

Upon receipt of numerous protests, the Commission, on January 3, 1967, entered upon an investigation of the proposed discontinuance specified in the railroad's notice, and in the same order required that the trains be continued in operation pending hearing and decision in such investigation. The order instituting the investigation is set forth herein as Appendix E.

On January 13, 1967, the Commission ordered that hearings in its investigation be held at Harrisburg and Williamsport, Pa., and at Olean and Buffalo, N.Y. At the conclusion of the hearings, at Buffalo, Penn Central offered its rebuttal case. The carrier's principal accounting witness thereupon presented data showing that, under the traditional accounting formula employed by the Commission in train-off cases, the

subject trains were operating at a profit.[3] The railroad then proceeded to distribute exhibits purporting to show that the *partial* operation of the daylight trains, *between Buffalo, N.Y. and Harrisburg, Pa.,* was being operated at a loss.

The hearing examiner adjourned the hearing to Washington, D.C., and permitted protestants one week to prepare cross-examination of this new Penn Central case for a partial discontinuance of the trains. Protestants appealed the ruling of the hearing examiner, but were overruled by the Commission on March 3, 1967. This order is set forth herein as Appendix F. The ensuing hearings at Washington, D.C. were solely concerned with cost accounting for the undue burden issue; the location of the further hearings at Washington, D.C., and the four month statutory period, precluded public testimony on the question whether the public convenience and necessity permitted a *partial* discontinuance of the trains over the Buffalo-Harrisburg (northern) segment.

By report and order dated May 3, served May 12, 1967, Division 3 of the Commission, by a two-to-one vote, found that operation of the trains between Buffalo-Harrisburg (northern segment) would (a) unduly burden interstate commerce, and (b) is not required by public convenience and necessity, but that operation between Harrisburg-Baltimore (southern segment) would (a) not unduly burden interstate commerce and (b) is required by public convenience and necessity. An order was entered requiring continued operation of the southern segment for the statutory one year period,

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[3] Penn Central has throughout expressed strong disagreement with this formula.

and discontinuing the investigation. Commissioner Virginia Mae Brown dissented, stating, "I do not intend to be ruled by the tyranny of figures when evaluating the public interest." (App. C, pp. 30a-33a)

No findings were made concerning the discontinuance proposed by the carrier's notice, as to which the public addressed its testimony in opposition, i.e., whether the entire operation between Buffalo and Baltimore would (a) unduly burden interstate commerce, and (b) is required by public convenience and necessity.

The majority opinion of the Commission's Division 3 relied heavily upon the financial analysis of the train service. It made separate analyses for the entire run (Buffalo-Baltimore), the nothern segment (Buffalo-Harrisburg), and the southern segment (Harrisburg-Baltimore). It found savable losses for all three, and adopted Penn Central's position that "feeder revenue . . . is in no sense revenue earned by trains 570 and 571 which should be included in the revenue of trains 570 and 571. (App. C, p. 21a)

Appellants, joined by 12 additional plaintiffs, brought suit immediately in the court below upon the issuance of the May 3, 1967 report and order. A temporary restraining order was issued, and continued, pending disposition of appellants' petitions for reconsideration of the May 3, 1967 decision and order. *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M.D. Pa. 1967).

2. The Commission's Order of July 6, 1967 on Reconsideration

Appellants timely petitioned for reconsideration of the May 3, 1967 decision and order. When feeder value is considered, which is a pro rata share of the joint

revenue, less expense, for through passengers and traffic interchanged with other Penn Central trains, appellants contended that by the very figures of Penn Central, the trains were indisputably operating at a profit over the entire run. Further, appellants pointed out that of the 43 witnesses testifying in support of the continued operation of the entire run of the trains, 42 of these were concerned with operation north of Harrisburg, rather than with the southern segment ordered to be continued by the Commission.

By order dated July 6, 1967, Division 3 of the Commission, acting as an Appellate Division, revised its prior finding of a $355,779 deficit for the northern segment. The deficit was reduced to $233,755 by the inclusion of $122,024 in feeder value attributable to the northern segment, thus reversing the prior report which had excluded such revenue. Division 3 did not, however, revise its financial analysis for the entire run from Buffalo to Baltimore by also including feeder revenue attributable to the entire train, which appellants had contended would result in a profitable showing for the entire run in the amount of $17,402, upon the very same figures used to allocate feeder revenue for the northern segment, nor were any other findings of the May 3, 1967 report disturbed upon reconsideration. (App. D, pp. 38a-40a)

The order of July 6, 1967 became effective August 3, 1967 by its terms. On that date the court below declined to continue its temporary restraining order or to issue an interlocutory injunction. Operation of the trains between Buffalo, N.Y. and Harrisburg, Pa. was discontinued on or about August 4, 1967.

3. Opinion of the Court Below

The gravamen of appellants' complaint seeking restoration of the through train service was that the Commission is required to make the two statutory findings for the entire discontinuance proposed by the carrier's notice, and for the train involved in such notice. Appellants also contend that the words "in whole or in part", set forth in the ordering power of section 13a(1), must be read to refer to the situation where a carrier's jurisdictional notice called for the partial discontinuance of a train. The district court's opinion rejected both views. It held that appellants' construction of the statute would "penalize the railroad for seeking to discontinue more of the operation than the Commission ultimately decided it was proper to do" (App. B, p. 7a), and that it saw "no reason to disturb the findings and Order of the Commission." (App. B, p. 8a)

There is no dispute as to the essential facts. The entire run is profitable based upon the customary accounting practices of the Commission in train-off cases, and employed by the Commission for the northern segment in its order on reconsideration. Defendants in the court below relied upon the proposition that it need not make findings governing the entire run of the trains.

The district court held that the agency may order the partial continuance of a segment of a train, even though the carrier's notice provided for an entire discontinuance. The court then turned to the findings made for the northern and for the southern segments, and found no prejudicial error to appellants. The court upheld the power of the Commission, where it requires continuance of a lesser amount than sought to be dis-

continued, to avoid the rendition of "appropriate statutory findings" governing the discontinuance proposed by the carrier's notice, or for the entire train, since it would appear that Congress so intended because the statute permits a railroad to discontinue an entire train absent an affirmative order of the Commission. (App. B, p. 6a)

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This is the first appeal brought to this Court since enactment of section 13a(1) of the Interstate Commerce Act in 1958, where the Commission actually entered into an investigation, held hearings, and issued a decision involving an interstate passenger train.[4] This is thus the first opportunity for the Court to examine the actual administration of the statute by the Commission, and where a *profitable* train service has been broken into segments. A large number of proceedings recently have been instituted by the railroads under the interstate provisions of the 1958 passenger discontinuance law, whereas previously primary attention has been directed to the intrastate provisions contained in section 13a(2).[5]

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[4] This court affirmed the action of a district court that upheld the exclusive discretion of the Commission to decline to enter upon an investigation into a proposed discontinuance of interstate ferry boats. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J. 1958), aff'd *per curiam*, 359 U.S. 27 (1959), and the court denied certiorari for a judgment dismissing a state's challenge to the constitutionality of section 13a(1) where the Commission also declined to institute an investigation. *Pennsylvania Railroad Company* v. *Sharfsin*, 369 F. 2d 276 (3rd Cir. 1966), cert. den. 386 U.S. 982, rehearing den. 386 U.S. 1043 (1967). See also *Sludden* v. *United States*, 211 F. Supp. 150 (M.D.Pa. 1962).

[5] *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963); *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964).

The large number of passenger train discontinuances occurring throughout the nation are not being effectuated by findings concerning the actual train service. Rather, the technique seized upon by the railroad industry, and adopted by the Commission, is the "partial" discontinuance whereby a train is broken up into segments for the purpose of findings and orders by the regulatory agency. Once a segment is thus discontinued, the entire train soon collapses, as demonstrated by Appendix G hereto.

Appendix G shows that during the full year 1967 and the first four months of 1968,[6] 134 trains were litigated before the Commission. Almost one-half of these trains, or 64, were notices proposing a partial discontinuance; and of the 70 trains for which a complete discontinuance was sought, 9 were permitted to be partially discontinued. The Commission denied discontinuance for only 6 percent of the partial discontinuances, thus granting relief to the carriers for 94 percent of the trains, and demonstrating that the public is at an extreme disadvantage where a railroad is able to focus only upon a segment of a train's run.[7] And in none of such cases did the Commission ultimately render the statutory findings as to whether the train is

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[6] The period Jan. 1, 1967-April 30, 1968 was selected since the current flood of interstate discontinuance cases under section 13a(1) did not reach the Commission for decision until the first quarter of 1967. See No. 34733, *Adequacies-Passenger Service-Southern Pacific Company Between California and Louisiana,* recommended report of examiner John S. Messer, served April 22, 1968, pp. 23-24.

[7] The Commission denied discontinuance for 20 percent of the trains sought to be discontinued in their entirety. For all train discontinuances, both partial and total, 13 percent were denied and 87 percent were permitted to become effective.

needed by the public or that continued operation would unduly burden interstate commerce.

This appeal thus involves issues of paramount national importance to the travelling public and to the economic viability of smaller communities. The slaughter of *profitable* passenger trains, as here, is being accomplished throughout the Nation by the technique of the partial discontinuance, in defiance of the clear wording of the statute and Congressional policy. The March 4, 1968 opinion of the court below, which further broadens the powers of the Commission in this regard, has already been seized upon by the Commission as a green light for the clear track ahead. *Chicago, B. & Q. R. Co. Discontinuance of Trains,* 331 I.C.C. 813, 827 (April 2, 1968).

I. Findings Are Required for the Entire Train

The court below held that the jurisdictional notice proviso, whereby a carrier may apply to discontinue a train, "in whole or in part", is not so interrelated with the ordering proviso, "in whole or in part", as to preclude the agency from ordering a partial continuance where a complete discontinuance was sought. The court below stated:

> "After the hearing in such investigation has been concluded, the Commission after appropriate statutory findings are made, may 'require the continuance or restoration of operation or service of such train or ferry, *in whole or in part,* for a period not to exceed one year from the date of such order.' (emphasis supplied)" (App. B, p. 6a)

The court below erred in holding that the above "appropriate statutory findings" requirement is satisfied

by the rendition of findings only with respect to various segments, rather than with respect to the train in its entirety, for the statute reads:

> "If . . . . , the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, . . ."

There is no limiting phrase, *in whole or in part,* to the statutory findings prerequisite for the entry of an order requiring continuance, *in whole or in part.* It is only after the entry of the required findings that the Commission may issue any order requiring continuance, in whole or in part. Further, the Commission's findings did not embrace the interrelationship of one segment to the other. As noted by the dissent of Commissioner Virginia Mae Brown, the decision as to one segment impairs the success of the other segment, as well as the viability of main-line trains passing through Harrisburg. (App. C., p. 33a)

II. The Opinion of the Court Below Is Inconsistent With the Proposition That Findings of the Commission in Train-Off Cases Are Subject To Judicial Review.

The thrust of appellants' attack against the Commission in the court below was that the agency failed to find whether the Buffalo-Baltimore trains, considered for their entire runs, would unduly burden interstate commerce or are required by public convenience and necessity. The Commission made separate statutory findings for the northern segment and for the southern segment, and reached opposite findings as to each segment. Yet the whole is greater than the sum of the separate segments; as to the undue burden issue,

this is owing to the Commission's long-maintained feeder value formula and to the movement of commerce and passengers between the two segments; as to the public convenience and necessity issue, this is owing to the fact that many passengers travel between the two segments, as well as to and from each segment, on the one hand, and stations on the east-west main line between New York/Philadelphia and Chicago/St. Louis, on the other hand.

If the Commission is compelled to enter findings as to the entire discontinuance proposed by the carrier's notice, also required for the entire train by the terms of the statute, it would be compelled to find, based upon reaffirmation of the feeder revenue formula in its July 6, 1967 order on reconsideration, that the entire Buffalo-Baltimore runs were being operated at a profit.

If the court below is correct in its holding, on preliminary motions, that orders of the Commission denying reconsideration of decisions in train-off cases are subject to judicial review, it necessarily follows that the Commission is bound by the usual judicial review provisions of the Administrative Procedure Act, and must make the required statutory findings. 5 U.S.C. §§ 557, 706. Although the Commission did not issue an affirmative order permitting discontinuance, it did render an order denying reconsideration, and in any event the "negative order" doctrine is no longer guiding. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125 (1939). Accordingly, the Commission must enter findings concerning the discontinuance proposed in the carrier's jurisdictional notice, which was the discontinuance specifically made the subject of an investigation order, and which was assigned for hearing and decision. In short, the Commission must make quasi-

jurisdictional findings for the Buffalo-Baltimore trains if its decisions in interstate train-off cases are subject to judicial review.

The courts need not reach the question whether the Commission, after making the quasi-jurisdictional findings on the entire run may then proceed, as here, to enter findings concerning various segments. The Court's task is complete where the quasi-jurisdictional findings are absent. *Alabama G.S.R. Co.* v. *United States,* 340 U.S. 216, 227-28 (1951); *Florida* v. *United States,* 282 U.S. 194, 215 (1931); *United States* v. *B. & O. R. Co.,* 293 U.S. 454, 464-65 (1935).

The Commission, in its first reported case under section 13a(1), held that it was obligated to enter quasi-jurisdictional findings even when it concluded not to issue an order requiring continuance. *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59, 73-77 (1959), frequently cited in train-off decisions. The court below held that decisions under section 13a(1) are subject to judicial review, 273 F. Supp. at 901-2. Yet the court below inconsistently thereafter held that the agency need not make findings on the entire operation of the train, even though this was the "such discontinuance" that ousted the jurisdiction of New York, Pennsylvania and Maryland, even though the decision actually made by the Commission was to discontinue the through service provided by the trains, and despite the specific language of section 13a(1), quoted above, requiring findings on the entire operation of the train before the Commission may enter any order requiring continuance for the southern segment of the Buffalo-Baltimore trains.

The court below passed over the necessity for quasi-jurisdictional findings for the entire run (App. B, p. 8a):

> "The remaining points raised by plaintiffs go to the Commission's findings. The function of this Court is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing Court is without authority to intervene. *United States* v. *Pierce Auto Lines,* 327 U.S. 315 (1946)."

The absence of quasi-jurisdictional findings for the entire run of the trains cannot be excused for lack of prejudice, because the United States and Commission conceded below that the trains might be profitable over the entire run:

> "That the train might have been profitable as a whole—through feeder and other revenues earned on the Southern segment—does not detract from the Commission's power to allow discontinuance of the unprofitable Northern segment."

> "The statute reads 'in whole or in part'; the 'part' is not limited by any language requiring an unprofitable 'whole'."

With regard to the public convenience and necessity issue, the court below, in upholding the Commission's finding that the northern segment is not required by public convenience and necessity, could not by implication assume a similar finding for the entire operation of the train, since a review court must judge the propriety of agency action solely by the grounds invoked

by the agency. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). Moreover, the two statutory tests of undue burden and public convenience and necessity do not stand separate and apart, as noted by the Commission. (App. C, p. 28a) In construing section 13a(2), this Court held that the Commission is required to balance the two statutory tests, against each other, in reaching the ultimate decision. *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 105 (1964).

A basic error of the court below stems from its failure to follow the natural consequences of the rule that decisions of the Commission denying continuance of trains are subject to full judicial review by the public in the same manner as decisions requiring continuance at the suit of a railroad. *State of Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80, 83-84 (D.C. Vt. 1967); *City of Williamsport* v. *United States,* 273 F. Supp. 899, 901-3 (M.D. Pa. 1967); *Public Service Board of State of Vermont* v. *United States,* 87 S. Ct. 3 (Harlan, J. 1966).

III. Findings Are Required for the Discontinuance Proposed by the Jurisdictional Notice To Avoid Incongrous Results

As shown above, decisions in train-off cases are subject to judicial review, and statutory findings are required for a train in its entirety before the Commission can issue any order requiring continuance, in whole or in part. However, findings are also required for the discontinuance proposed by the carrier's notice to avoid incongruent results.

The Commission, and the court below, held that the jurisdictional notice proposing a discontinuance, in whole or in part, is not so interrelated with the ordering power of the statute, in whole or in part, as to re-

strict the Commission to the discontinuance specified in the jurisdictional notice. (App. B, p. 7a; App. D, p. 39a) But if such principle is operative where the carrier proposes a complete discontinuance, and the Commission renders findings for a partial continuance, then the relationship should apply in reverse; that is, if a carrier proposes a partial discontinuance, it would seem that the Commission, upon the theory of the court below, could enter findings for an entire discontinuance and thereupon issue an order requiring continuance of the entire train for a one year period. Certainly the court below did not intend such a result, but it logically follows from the opinion.

An alternative statutory construction, not without support in the legislative history, would be that the "in whole or in part" language of the jurisdictional proviso refers not to the "discontinuance", but to the "rights" of the carrier mentioned in the first sentence of section 13a(1). Under such a construction, the carrier could not propose a piecemeal discontinuance, but would in all instances be required to subject the entire train to federal jurisdiction if it elected to proceed under the statute. The agency findings would thereupon be required for the entire train prior to any additional findings as to segments, and to the issuance of orders relating to segments.

Accordingly, under any acceptable construction of the statute, findings are required on the discontinuance proposed by the jurisdictional notice. Indeed, it is the jurisdictional notice by which state authority is superseded.

CONCLUSION

It is submitted that the decision of the court below fails to recognize that the Interstate Commerce Commission is under a duty to render findings on the entire run of a passenger train, and is under a special duty to do so when such train is actually proposed to be discontinued in its entirety. The questions presented by this appeal are substantial, are of immediate public importance, and require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Appellants

Of Counsel:

JOHN P. CAMPANA, *Solicitor*
City of Williamsport
36 West Willow Street
Williamsport, Pa. 17701

ANTHONY MANGUSO, *Corporation Counsel*
ABRAHAM I. OKUN, *Asst. Corp. Counsel*
City of Buffalo
1100 City Hall Building
Buffalo, N. Y. 14202

SAMUEL C. RANCK, *Solicitor*
Borough of Milton,
45 N. Front Street
Milton, Pa.

ROBERT D. O'CONNOR, *Solicitor*
Borough of Renovo
138 East Water Street
Lock Haven, Pa. 17745

THOMAS P. SHEARER
1801 Grant Building
Pittsburgh, Pa. 15219

ROBERT P. CASEY
FRANK J. MCDONNELL
200 Mears Building
Scranton, Pa. 18503

HARVEY GELB
430 Scranton Life Building
Scranton, Pa. 18503

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